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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 681

FIDUCIARY COUNSEL, INC.,
Petitioner,

v.

W. WILLARD WIRTZ,
Secretary of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

OPINION BELOW 1
JURISDICTION 1
QUESTIONS PRESENTED 1
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATUTES INVOLVED 2
STATEMENT 3
REASONS FOR GRANTING WRIT 5
APPENDIX:
Opinion Below (Decided July 7, 1967) 1A

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Carl L. Shipley, attorney for Fiduciary Counsel, Inc., petitioner herein, respectfully requests in its behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case, set forth at page 1-A in the appendix hereto. This Court has jurisdiction per 28 U.S.C. 1254.

QUESTIONS PRESENTED

Did the court below err in concluding that petitioner Fiduciary Counsel, Inc., an investment adviser registered with the Securities and Exchange Commission pursuant to

the Investment Advisers Act of 1940, which supplies investment counselling and advice to two employee pension trusts of Parker Pen Company, is an "administrator, officer and employee" of such plans "who handles funds or other property" and is thus required to be bonded under the Welfare and Pension Plans Disclosure Act, 29 USC 308(d)(a)(1964)?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 1:

> "All legislative powers herein granted shall be vested in a Congress. . . ."

Amendment 5

> ". . . No person shall be deprived of property without due process of law; . . . ."

STATUTES INVOLVED

29 USC 304(b)

> "The term 'administrator' whenever used in this chapter, refers to . . . the person or persons . . . actually responsible for the control, disposition or management of the money received or contributed . . ."

29 USC 308(d)

> "Every administrator, officer, and employee of any employee welfare benefit plan or of any employee pension benefit plan . . . who handles funds or other property of such plan shall be bonded as herein provided . . . . The amount of such bond . . . shall be not less than 10 per centum of the amount of the funds handled . . . except that any such bond shall be in at least the amount of $1,000 and no such bond shall be required in an amount in excess of $500,000."

29 USC 508(d)(b)

"It shall be unlawful for any administrator, officer or employee . . . to receive, handle, disburse or otherwise exercise custody or control of any of the funds or other property of any employee welfare benefit plan or employee pension benefit plan without being bonded as required . . .".

STATEMENT OF CASE

Petitioner, Fiduciary Counsel, Inc., is a registered investment adviser under the Investment Advisers Act of 1940, 15 USC, ¶ 80 b(1964) and is subject to regulation thereunder by the Securities and Exchange Commission. The respondent Secretary of Labor is the official responsible for administering the Welfare and Pension Plans Disclosure Act, 29 USC ¶ 201, et seq. Since October 2, 1962, petitioner has been retained on a fee basis to act as investment counselor for two pension trusts of the Parker Pen Company, Janesville, Wisconsin. These trusts were established for the purpose of funding retirement, death and disability benefits for certain of Parker's employees. The trustee of each trust is the Merchants and Savings Bank of Janesville, Wisconsin. Both of said trusts are noncontributory in that employees make no contributions to the trust fund; Parker Pen is the sole contributor. All funds of the two trusts are maintained in the custody of the trustee bank.

Under the trust instruments, the Merchants and Savings Bank of Janesville, Wisconsin, as corporate trustee, is given full power "to make such sales and investments from time to time in the trust fund held by it and to take every action with respect to the investment held therein as in its discretion it deems proper".

In addition, the trust instruments provide in terms that the Parker Pen Company "shall nevertheless have full power in its discretion from time to time to select and appoint an investment counsellor to direct the trustee to make sales

and investments and retain investments with respect to the trust fund held by the corporate trustee, and the corporate trustee shall act on such directions of the investment counsellor and make every sale or investment or retention of investment with respect to the trust fund held by it as directed by the investment counsellor."

Further, the trust instruments provide in terms that the Parker Pen Company "may remove the trustee at any time upon thirty days prior written notice to the trustee", and that either plan shall be terminated on thirty days' written notice from the Parker Pen Company.

Petitioner Fiduciary Counsel, Inc., at no time has physical possession of any of the funds or property of the two Parker Pen trusts. Such funds and property are at all times in the custody of the Merchants and Savings Bank of Janesville, Wisconsin, the corporate trustee. From time to time since October 2, 1962, petitioner has directed the trustee bank, pursuant to the provisions of the trust instruments, to make sales and investments, and the trustee bank has complied with such investment advice. Such compliance is, of course, subject to the bank's discretion as outlined above.

On April 25, 1963, respondent advised petitioner by letter that in his opinion petitioner is subject to the bonding provisions of the Welfare and Pension Plans Disclosure Act, which requires a bond of not less than 10% of the amount of funds "handled", or $500,000, whichever is less.

Petitioner claimed exemption from coverage by the Act on grounds it is not an "administrator, officer and employee of any employee welfare benefit plan . . . who handles funds or other property of such plan" within the meaning of the Act, and sought a declaratory judgment in the United States District Court for the District of Columbia to that effect. The parties, by means of interrogatories and a stipulation, disposed of controversy on material facts, and the parties cross-moved for summary judgment in said Court. The U.S. District Court granted respondent's motion for summary judgment and denied plaintiff's cross-motion for summary judgment.

Upon review the United States Court of Appeals for the District of Columbia Circuit in an opinion dated July 7, 1967, ruled that "we have no reason to reject the District Court's conclusions as to the coverage of the statute," but remanded the case to the U. S. District Court to determine whether or not respondent had acted reasonably in exempting, under his rules, banks and certain other regulated institutions, with whom petitioner competes, from the bonding requirements of the Act, while not exempting petitioner. Petitioner Fiduciary Counsel, Inc., respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals to review only the question of coverage of the statute as outlined hereinabove.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF A WRIT

The Welfare and Pension Plans Disclosure Act, 29 USC 308(d) requires in terms that every administrator, officer, and employee of any employee welfare benefit plan, or of any employee pension benefit plan, who handles funds or other property, shall be bonded in an amount of 10% of the amount of the funds handled up to $500,000. Section 308(d)(b) of the Act makes it unlawful for any of the named classes of persons "to receive, handle, disburse, or otherwise exercise custody or control of any of the funds or other property of any employee welfare benefit plan or employee pension plan benefit plan" without being bonded under the statute. The Act defines "administrator" as the person with responsibility for the control, disposition or management of the money received or contributed, irrespective of whether such control, disposition or management is exercised directly or through an agent or trustee designated by such person. (29 USC 304(b)). Although the Act (29 USC 302(a)) contains definitions for many of the other terms used in the statute, significantly it does not contain any definition of the statutory language "handles funds or

other property". The Secretary of Labor has promulgated rules which in effect modify and extend the Act, with a dragnet web of definitions including almost anyone having the remotest connection with any such plan, regardless of whether or not they are, as a matter of fact and law, an administrator or whether or not as a matter of fact and law they handle funds or other property of such plan.

Petitioner Fiduciary Counsel, Inc. is exclusively in the business of providing investment counselling and advice on a fee basis to selected clients, individual, corporate and otherwise. It is registered with the Securities and Exchange Commission and subject to the civil and criminal provisions of the Investment Advisers Act of 1940, under which the Securities and Exchange Commission regulates its registered investment advisers and requires from them reports and certain other administrative restrictions for the protection of the persons and entities for whom registered investment advisers provide counselling service. Petitioner never handles funds or other property of the two Parker Pen trusts involved herein, and never has custody of any such funds or other property. Petitioner is not responsible for "control, disposition or management of the money received or contributed", the Act's definition of an "administrator". The bank and/or Parker Pen are given that power under the plans. Under the trust instruments involved Parker Pen Company reserves the right to terminate both the trusts themselves and its agreement with the designated investment adviser, who is petitioner herein. The actual administrator and custodian of the funds and other property, and the only entity which handles said funds and other property, is the Merchants and Savings Bank of Janesville, Wisconsin. The trustee bank has full and complete discretion to buy and sell securities and take any other action with respect to the trust funds as in its discretion it deems proper. Although the bank-trustee is required to comply with the investment advice and counsel of petitioner, Fiduciary Counsel, Inc., it is nonetheless free not to do so in accordance with its discretionary power to take whatever action it deems proper as trustee and custo-

dian of the funds and property of the two Parker Pen trusts. In addition, Parker Pen Company has reserved to itself the power to terminate any relationship it has with petitioner Fiduciary Counsel, Inc., and more importantly, to terminate the plan and the trust on thirty days' notice, thus depriving the Merchants and Savings Bank of Janesville, Wisconsin, of any power as custodian to handle funds or other property of the two Parker Pen trusts.

Petitioner Fiduciary Counsel, Inc., respectfully submits to the Court that the actions of the Secretary of Labor herein amount to an exercise of legislative power in violation of Article I, Section 1 of the Federal Constitution, in that he has extended and broadened the coverage of the Act to include petitioner Fiduciary Counsel, Inc., which as a matter of law is not an administrator of the two Parker Pen plans, and does not handle funds or other property of either of such plans within the meaning of the Act. Petitioner Fiduciary Counsel, Inc., further respectfully submits that the action of respondent herein requiring it to be bonded under the Act, is arbitrary, capricious, and in violation of petitioner's right to due process under Amendment V to the Federal Constitution.

CONCLUSION

For the reasons outlined hereinabove and because the statute involved has not heretofore been construed by this Court or any other court with respect to the coverage of the Act, and additionally because the actions of respondent Secretary of Labor herein raise a serious constitutional question respecting the extent to which he can, in the exercise of administrative authority, extend and broaden the reach of an act of Congress, petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

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